Petition

81-1704

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No._____

**IN THE
SUPREME COURT OF THE
UNITED STATES**

October Term, 1981

ROBERT C. HATCH and CLAUDIA R. HATCH

Petitioners

vs.

WALTER C. MADSEN, Superintendent of Banks for the State of Arizona, as Receiver for Heritage Trust Company, a corporation

and

RELIANCE INSURANCE COMPANY, a corporation

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Must a garnishment lien in Texas attach only to specific personalty, or does it attach to the debt itself, impound all funds or effects from which the debt may be paid, and make it unlawful for the garnishee to pay the debt to the principal defendant?

2. Did the mere appointment of a receiver for Heritage Trust Company, an Arizona corporation, by an Arizona court ipso facto give the receiver title to the proceeds alleged owing, in contract and tort, from a fidelity bond insurance contract issued to Heritage by Reliance Insurance Company, so as to exempt the debt from garnishment in Texas?

3. Does the appointment of a receiver in Arizona give the Arizona court extraterritorial jurisdiction beyond the boundaries of Arizona?

4. Did the federal courts below give full faith and credit to the acts, records and judicial proceedings of the state of Texas?

DESIGNATION OF PARTIES

The parties to this Petition are as designated in the caption.

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners earnestly pray that a Writ of Certiorari issue to review the judgment of the United States District Court for the District of Arizona entered on February 6, 1980, as amended on March 20, 1980; and the judgment of the United States Court of appeals for the Ninth Circuit, affirming the U.S. District Court, entered on November 5, 1981; and the Order of Court denying rehearing entered on December 23, 1981.

REFERENCE TO REPORTS OF OPINIONS IN COURTS BELOW

The opinions and orders in question are reproduced in the Appendix.

The errors in the opinions below cry out for review. They overturn or ignore United States Supreme Court decisions dating back to the nineteenth century and firmly standing as stare decisis today.

The lower court errors will not be published in the Federal Reporting System. The Opinion of the Ninth Circuit Court of Appeals is designated "Memorandum." Local Rule 21. of the 9th CCA provides that a "Memorandum" is not intended for publication, shall not reveal its author, shall not be designated "per Curiam," shall not be regarded as precedent, and shall not be cited to or by Ninth Circuit courts except as law of the case, res judicata or collateral estoppel. This means, unless exposed by the light of judicial review, the errors of law in the lower courts' opinions will lurk in anonymity depriving present and future petitioners of rights well-established in published precedents on which they have relied.

We respectfully suggest that the appearance of ad hominem whimsy or improprieties made possible by the device of covert "Memorandum" decisions should itself warrant censure by this highest Court, and at least justifies turning over the Rule 21. rock to see what's underneath.

STATEMENT OF JURISDICTIONAL GROUNDS

(1) The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

(2) This Petition is brought to review a "Memorandum" decision of the United States Court of Appeals for the Ninth Circuit which affirmed a judgment of the United States District Court for the District of Arizona. The "Memorandum" was entered on November 5, 1981, and, along with the U.S. District Court opinion of February 6, 1980, as amended on March 20, 1980, is reproduced in the Appendix. A petition to the Court of Appeals for rehearing was denied by order entered December 23, 1981, (also in Appendix).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution: Article IV. Section 1. Full Faith and Credit shall be given in each state to the Public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved and the effect thereof.

Title 28 U.S.C. Sec. 1738. State and territorial statutes and judicial proceedings; full faith and credit.

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***

(Par. 3) Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they

have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Vernon's Annotated Texas Statutes, Title 68, Article 4076-Garnishment. The clerks of the district and county courts and justices of the peace may issue writs of garnishment returnable to their respective courts in the following cases:

1. ***

2. ***

3. Where the plaintiff has a valid subsisting judgment and makes affidavit that the defendant has not within his knowledge property in his possession within the state, subject to execution, sufficient to satisfy such judgment.

Vernon's Annotated Texas Statutes, Title 68, Article 4084: From and after service of such writ of garnishment it shall not be lawful for the garnishee to pay to the defendant any debt or to deliver to him any effects.

Texas Rules of Civil Procedure:

Rule 657. Judgment Final for Garnishment.

In the case mentioned in subdivision 3. of Article 4076 of the Revised Civil Statutes of Texas, 1925, the judgment, whether based on a liquidated demand or an unliquidated demand, shall be deemed final and subsisting for the purpose of garnishment from and after its rendition, unless a supersedeas bond shall have been approved and filed in accordance with Rule 364.

Rule 663. Execution and Return of Writ.

The sheriff or constable receiving the writ of garnishment shall immediately proceed to execute the same by delivering a copy thereof to the garnishee, and shall make return thereof as of other citations.

Three additional federal statutes are involved and are reproduced in full in the Appendix. These are:

Title 28 USC Sec. 1335 - Interpleader

Title 28 USC Sec. 2201 - Declaratory Judgment (also, Rule 57, Declaratory Judgment, Fed. Rules of Civil Procedure)

Title 28 USC Sec. 1652 - State Laws As Rules of Decision

STATEMENT OF THE CASE

Material Facts

On March 5, 1976, Petitioners, Robert and Claudia Hatch, husband and wife, citizens of Texas and residents of Galveston County, were awarded a judgment by the District Court of Galveston County. The judgment included actual and exemplary damages to be paid by Heritage Trust Company, an Arizona corporation, and several other defendants—co-conspirators with Heritage in a fraudulent scheme involving the sale of questionable interests in property such as encumbered pieces of the Arizona desert. The scheme had been exposed by the Securities and Exchange Commission which filed suit against Heritage and other defendants in 1974 in the United States District Court

for the District of Arizona. The Court made findings of fraud and, in July 1975, ordered copies of such findings to be sent to trustors who had entrusted their savings to Heritage, including Mr. and Mrs. Hatch, so that they could consider legal remedies. (S.E.C. v. Heritage et al, 402 F. Supp 744).

After arduous efforts to recover their savings from Heritage, the Hatches filed suit. Service of process was made on the Secretary of State of Texas, statutory agent for the out-of-state defendants. Copies of process were properly forwarded by the Secretary of State, but none of the defendants chose to appear in the Texas action. The aforesaid judgment was entered by default, after careful consideration of all factual and legal questions by the Honorable Donald M. Markle, Judge of the District Court of Galveston County.

The Hatches registered their March 5, 1976, Texas judgment as a foreign judgment in the Superior Court of Maricopa County, Arizona, on April 1, 1976.

On April 16, 1976, the Superior Court of Maricopa County appointed the Superintendent of Banks for the State of Arizona as Receiver for Heritage Trust Company and issued an injunction forbidding all trustors, including the Hatches, from initiating any further proceedings against Heritage, the receivership defendant. (Walter C. Madsen later succeeded Richard W. Koeb as Superintendentof Banks and receiver.)

Toward the end of August, 1976, the Hatches received from Heritage a "Receiver's First Accounting and Report"

containing the statement, "The Receiver, under the company's present circumstances, is required to defend and initiate numerous legal actions in several states because of the inability of this Court's Order to stay actions pending in other states or the federal courts." Thus, it was clear that although the Order prevented the Hatches from enforcing their judgment in Arizona, they were not enjoined from executing their judgment in Texas.

The Hatches attempted to locate Heritage assets, principally in Texas. They served executions on other defendants, which were returned unsatisfied. On or about March 30, 1977, they caused to be served a Writ of Garnishment on Reliance Insurance Company, a Pennsylvania Corporation, authorized to do business in many states, including Texas and Arizona.

In 1972, Reliance had sold to Heritage (then called Federal Trust) a three-year commercial blanket bond—a fidelity insurance contract providing for indemnities to be paid for losses resulting from fraudulent or dishonest acts by Heritage employees. On July 26, 1976, the Receiver filed suit against Reliance in the Superior Court of Maricopa County, Arizona, to collect the alleged debt owing by Reliance to Heritage under the terms of the insurance policy.

On September 28, 1977, by amendment the Receiver filed a new complaint and prayer against Reliance in Maricopa County alleging losses and damages owing to Heritage due to the negligence of Reliance in issuing and maintaining the bond.

The March 5, 1976, judgment for the Hatches against Heritage in the District Court of Galveston County, Texas, was in Case No. 114,361. The Garnishment action was ancillary to judgment and was numbered 114,361-A. Reliance denied liability to Heritage or to the Hatches. The Hatches filed a motion for summary judgment which was denied since the Court felt there were fact questions concerning the liability of Reliance to Heritage, but it was the Court's expressed opinion (as admitted by Reliance in its Memorandum in support of its Complaint in interpleader) that the Hatches were entitled by virtue of their writ of garnishment to any funds found owing by Reliance to Heritage (up to the amount of their judgment against Heritage).

In the case of Hatch v. Reliance, 114,361-A, in Galveston the November, 1977 date set for trial of the issues drew near. As the Hatches prepared for trial they were assisted by the Receiver who furnished documentary evidence to them for use in proving the liability of Reliance to Heritage in the Texas trial.

On November 1, 1977, Reliance filed an action in the nature of interpleader in the United States District Court for the District of Arizona. Ex parte, the Court issued an injunction preventing the Hatches in Texas and the Receiver in Arizona from proceeding with their respective state court law suits. On motion by the Hatches, the injunction was dissolved by the Court that had issued it. The Hatches proceeded with preparations for trial. Reliance managed to find a single U.S. Court of Appeals judge in San Diego who issued an Order Staying the District Court's dissolution of its own injunction. On the morning

of their trial, Mr. and Mrs. Hatch and their attorney had to walk away form their own Galveston County Court and undertake the time-consuming, expensive efforts to litigate their claim in the U.S. District Court in Phoenix.

After various discoveries and motions by all parties in the United States District Court, petitioners moved for a declaratory judgment to confirm the effect under Texas law of their writ of garnishment—to render it enforceable in the interpleader action if, as and when the debt of Reliance to Heritage under the terms of the insurance policy, or as a result of negligence, was established. The Motion was filed on August 8, 1979. On February 6, 1980, the Honorable Valdemar A. Cordova, Judge of the U.S. District Court, denied the Motion; on March 20, 1980, Judge Cordova amended certain facts in his Order, but denied the Hatches' Motion for New Trial.

Robert and Claudia Hatch filed Notice of Appeal on April 2, 1980. Oral argument was heard by the United States Court of Appeals for the Ninth Circuit on October 15, 1981; and by "Memorandum" decision of November 5, 1981, a three-judge panel of the Court of Appeals affirmed the judgment of the U.S. District Court for Arizona. Appellants' petition for rehearing was denied by the Court of Appeals on December 23, 1981. This Petition for Writ of Certiorari follows.

JURISDICTION OF THE FEDERAL COURT OF FIRST INSTANCE

The United States District Court for the District of Arizona assumed jurisdiction and pre-empted trial of the

issues from the state courts of Arizona and Texas, based upon the Interpleader Statute, Title 28 U.S.C. Sec. 1335. A copy is reproduced in the Appendix.

ARGUMENT

Considerations Governing Review
Introduction

The questions presented for review arise from the Opinion of the U.S. District Court for the District of Arizona, as affirmed by the "Memorandum" decision of the U.S. Court of Appeals for the Ninth Circuit. The Opinion and the Memorandum are reproduced in full in the Appendix. Each has a key sentence which sums up each court's errors of law which are in conflict with decisions of the U.S. Supreme Court, federal district and appeals courts, and state supreme courts.

The U.S. District Court states: "A lien on personalty could only have been attained by the attachment of the specific personalty and only if such attachment was made prior to the Receiver's appointment."

In affirming the two propositions quoted above, the three-judge panel of the Court of appeals states: "Because all of the assets, including any rights which Heritage may have to the proceeds of the bond were placed in the hands of a receiver in Arizona before the Hatches served the writ of garnishment on Reliance, the garnishment could not have resulted in a valid attachment of any debt owed

by Reliance to Heritage. 75 C.J.S. Receivers Sec. 135 at 775."

The above-quoted rulings are contrary to federal and state law in at least four seminal areas, as follows:

1. Garnishment Impounds All Funds and Effects Available to Pay Debt and Is Not Limited to the Attachment of Specific Personalty

The first concept recited by the U.S. District Court for the District of Arizona—that garnishment only creates a lien if it attaches to specific personalty—is a concept not found in any statute, judicial decision or published authority. The U.S. District Court did not cite any source for such a concept, nor did any party document any grounds for such a misreading of the law of garnishment. Even the U.S. Court of Appeals did not expressly repeat the erroneous concept that the remedy of garnishment is limited to specific personalty, although by affirming the lower court's opinion the Appeals Court has concurred in the error.

Garnishment is a creature of statutory law. In no state or federal jurisdiction does a statute limit the effect of a writ of garnishment to its attachment of specific personalty.

The particular effect of garnishment applicable to the rights of Petitioners, Robert and Claudia Hatch, is that of Title 68 Vernon's Annotated Texas Statutes Sec. 4084 (Supra) which makes it unlawful "for the garnishee to pay the defendant any debt or to deliver to him any effects."

The simplest exposition of what garnishement is and how it works may be found in Comment b of the Restatement 2_d - Conflicts, Sec. 68. To quote,

"Comment b. If A has a claim against B, and B has a claim against C, the basis for a garnishment action by A exists if there is jurisdiction over C, though not over B." (In other words, if the Hatches have a claim against Heritage and Heritage has a claim against Reliance, the basis for a garnishment action by the Hatches exists if there is jurisdiction over Reliance even if not over the Arizona Receiver for Heritage.)

The most complete exposition of case law on the nature of garnishment and on the duty of a federal interpleader court to follow the law of the state in which garnishment was filed is Sanders v. Armour Fertlizer Works, (1934) 54 S. Ct. 345, 290 U.S. 623, 78 L. Ed. 543; Affirmed, 54 S. Ct. 677, 292 U.S. 190, 78 L. Ed. 1206. As held in Sanders, by service of the writ of garnishment the garnishee's obligation to pay his creditor is arrested and a lien created upon the debt itself; and, quoting from Martin v. Dryden, 6 Ill. 187, "By the service of garnishment upon any having estate, property or effects of his in their hands, the law has laid hold of a fund which it may condemn, and appropriate to the satisfaction of whatever judgment it may render against the defendant, and thereupon the court proceeds to hear as to the indebtedness."

The similar effect of garnishment in the State of Texas is confirmed by the United States Supreme Court in U.S. v. Liverpool & London and Globe Insurance Co., 348 U.S. 215, 77 S. Ct. 247, 99 L Ed 268 (1955): "The garnishment

and attachment statutes of Texas . . . have been uniformly construed as creating a lien upon personal property from the date of levy. Kanaman v. Hubbard, 110 Tex. 560, 222 SW 151; Focke v. Blum, 82 Tex. 436, 17 SW 770; U.S. v. Yates (Tex. Civ. App.) 204 SW_{2d} 399. See Tex. Jur. 179, attachment Sec. 15, and see U.S. v. Standard Brass & Mfg. Co. (Tex. Civ. Appeals) 266 SW_{2d} 407."

Following Texas law and the United States Supreme Court opinions, the Texas court was proceeding to hear as to the indebtedness of Reliance to Heritage when the federal interpleader court removed the matter to the District of Arizona.

The hearing as to the indebtedness of Reliance to Heritage was never reached in the interpleader court. The U.S. Court of Appeals affirmed the interpleader court's ruling that Petitioners had no garnishment claim on Reliance for its alleged debt to Heritage. The interpleader court then dismissed the Hatches' claim and ordered their participation in the interpleader action terminated!

2. The Mere Appointment of a Receiver by an Arizona State Court Did Not Give the Receiver Title to the Proceeds of a Fidelity Bond Insurance Policy, Alleged Owing in Contract and Tort, so as to Exempt the Debt From Garnishment in Texas.

The only remaining clause in the key sentence of the U.S. District Court Opinion presents the concept that a garnishment lien could only attach if the Texas writ of garnishment after judgment was served prior to the Arizona

court's appointment of the Receiver for Heritage. Once again, no authority is given for such a concept, although there is an abundance of authority to the contrary.

The U.S. Court of Appeals also upheld this second concept, but in doing so the anonymous author does cite one authority. A reading of the authority, however, reveals a meaning exactly the opposite of the meaning endorsed by the three-judge Appeals Panel. Also, the citation is under the Corpus Juris Secundum subject: Receivers, IV. Title and Possession of Property, wherein the discussion is limited to the powers of a receiver in the state of his appointment. The receivership sections of C.J.S. applicable to Petitioners' Texas judgment and garnishment are under the Rubric: IX. Foreign and Ancillary Receivers.

The citation relied upon by the Appeals Court as presented by the appellee below is: "75 C.J.S. Sec. 135 at 775." We assume the court is relying on the excerpt of Sec. 135 in appellee's brief. It refers first to the exemption of a receiver as garnishee; then to exemption of a third party garnishee (such as Reliance). The excerpt of Section 135 presented by Appellee below is: "The exemption attaches only where the court appointing the receiver had jurisdiction and only to property which he holds as receiver. Likewise, where someone else is garnishee, the receiver's title will prevail over the claim of the garnishing creditor—providing the receiver's title has attached at the time of the service of the garnishee process." (Emphasis supplied.)

The mere appointment of the Receiver for Heritage by an Arizona state court did not give him title to the indemnities promised by the Reliance insurance policy, nor title to the debt owing as a result of the negligence of Reliance in issuing and maintaining the policy. The Receiver stepped into the shoes of Heritage, the receivership defendant. He has the same rights and obligations. He has a claim—a chose in action—against Reliance, which is "a personal right not reduced to possession, but recoverable by a suit at law." (N.C. Bank & Trust Co. v. Williams, 160 S.E. 484.)

The debts alleged by the Receiver and by the Hatches to be owed by Reliance, due to Reliance's denial of liability, could not be possessed until found owing in a suit at law. The rights which Heritage may have had to the proceeds of the bond could in no way be converted to assets whose title vested in the Receiver until the Receiver proved that the Reliance debts were indeed owing to Heritage. (After debts are paid, they are no longer garnishable, of course, since they are no longer debts.)

Viewed from Texas, where the final and subsisting judgment against Heritage, the judgment debtors, was obtained by Petitioners, and where the ancillary writ of garnishment was served on a Heritage debtor, Reliance, in enforcement of said judgment, the Receiver in Arizona has only those rights given to him within the state of Arizona, "where the court appointing the receiver had jurisdiction."

"It is not a question of possession in the foreign state,

for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of." (By service of the writ) "notice to the debtor of the commencement of the suit, and notice not to pay to his creditor is all that can be given whether the garnishee be a mere casual and temporary comer, or a resident of the state where the attachment is laid. His obligation to pay his creditor is thereby arrested and a lien created upon the debt itself . . .

"It is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign state after personal service of process therein just as well as by the courts of the domicil of the debtor." (Harris v. Balk*, 198 U.S. 215, 47 L. Ed. 1023, 24 S. Ct. 625 (1905); cited in Sanders v. Armour, supra, and most recently—1980—in Banco Nacional of Cuba v. Chase Manhattan Bank, 505 F Supp 412, 439.

*In Harris, before getting a judgment against his debtor, the garnisher proceeded against the garnishee. A better procedure is recommended by Justice Thurgood Marshall in Shaffner v. Heitner, 433 U.S. 186, 53 L. Ed 2_d 683, 97 S. Ct. 2569 (1977). Commenting on Harris v. Balk, in footnote #18, Justice Marshall writes, "The problem with this reasoning is that unless the plaintiff has obtained a judgment establishing his claim against the principal defendant . . . his right to 'represent' the principal defendant in an action against the garnishee is at issue." In accordance with Justice Marshall's suggested procedure, Robert and Claudia Hatch first obtained a judgment against Heritage, then filed their action against Reliance.

3. The Arizona Court Through Its Appointed Receiver Has No Extraterritorial Jurisdiction; Its Powers Are Limited to the State of Arizona.

The Arizona Receiver, while Heritage is in receivership, has a right to manage its property in Arizona and a right to sue if necessary to obtain possession or title to assets or to obtain payment of debts and claims. It could be argued that such rights were placed exclusively in the hands of the Arizona receiver by the Arizona Court's injunction against all trustors and creditors, forbidding them to commence enforcement proceedings in Arizona. But such rights do not constitute title to assets and fall far short of 75 C.J.S. section 135's requirement that the receiver's title must attach first for such title to prevail over the rights of a garnishing creditor--and then only where the court appointing the receiver has jurisdiction.

"The Supreme Court has approved the doctrine that debts accompany the debtor and may be attached wherever he can be sued by his creditor. The Court has disproved the notion that when debts are exempt from execution in the state where created, this privilege follows as an incident into other jurisdictions." (Sanders v. Armour, supra, citing Chicago R.I. & P.R. Co. v. Sturm, 174 U.S. 710, 19 S. Ct. 797, 43 L. Ed. 1144).

No rights or title superior to those of Heritage Trust Company before it was placed in receivership were vested in the Receiver by virtue of his appointment. As stated above, the Receiver merely acquired Heritage's chose in action against Reliance, leaving the alleged debt subject to garnishment wherever it could be reached by jurisdiction and service on the garnishee and whenever it could be reached prior to payment.

The Arizona state court by appointing a receiver to manage the affairs of an Arizona corporation, achieves no jurisdiction beyond the Arizona state boundaries. It cannot bar the enforcement in Texas by ancillary garnishment proceedings of a final judgment rendered by a Texas court—especially since the Texas judgment against the corporate receivership defendant was entered several weeks before the appointment of the receiver.

And the prior jurisdictional rights of the Texas court cannot properly be dismissed or ignored by a federal interpleader court in Arizona, so as to invalidate the Texas court's garnishment execution served on a garnishee/debtor doing business in Texas to impound debts due to the principal defendant, the Arizona corporation.

The Courts below, in effect, have allowed the Arizona receiver to reach over into the state of Texas and deprive Petitioners, citizens of Texas, of remedies and privileges given them by the statutes, rules and judicial decisions of their own state courts. In so doing the district and circuit courts have violated Title 28 U.S.C. Sec. 1652. State laws as Rules of Decision (Appendix I).

By allowing the Arizona receiver and Reliance Insurance Company exemption from the garnishment law of Texas, the Ninth Circuit Court of Appeals has ruled directly contrary not only to established federal and state law, but contrary to its own published precedents, e.g., "The appointment of a receiver has and can have no extraterritorial effect." (Bashear v. Intermountain Bldg. and Loan Assn., C.C.A. Cal 9th Circuit, 109 F_2 857, cert. denied, 61 S. Ct. 9, 311 U.S. 655, 85 L. Ed. 419 (1940).

There is no authority supporting the anonymous author's reversal of precedent, no reasoning behind her challenge and open conflict with Supreme Court decisions in the unpublishable "Memorandum" in the Court of Appeals below.

Two categories of debt are alleged by the Receiver as owing by Reliance to Heritage. On July 26, 1976,

the Receiver filed an action in Arizona to recover the debt due Heritage under the terms of the Reliance fidelity bond. On September 28, 1977, the Receiver filed his claim to recover the debt due to Heritage as a result of negligence by Reliance in issuing and maintaining the bond. The writ of garnishment served on Reliance in Texas on or about March 30, 1977, impounded both categories of debt.

All of the rules and cases referred to by the Receiver and Reliance in the Courts below apply to liens on property in the prior possession of the receiver in the state of his appointment; such as 75 C.J.S. Sec. 135 at 775, the only authority cited by either court below. The sections that apply to judgments and liens in states other than the state appointing the receiver contain the rules and decisions that are directly on point in the Court's consideration of this Petition.

For example, (in IX. A. Foreign Receivers - Sec. 391-401, pp. 1069-1080):

75 C.J.S. 394: " . . . The receiver's power extends no further than that of the court appointing him and cannot be asserted as a matter of right beyond the territorial jurisdiction of such court." (Sterrett v. Stoddard Lumber Co., 46 $P2_d$ 1023, 105 Or 491.)

75 C.J.S. 396 b: "A receiver appointed by the courts of one jurisdiction does not have custody, nor does he have an enforceable right to possession of property in a jurisdiction other than that of his appointment except as a matter of comity. The court of his appointment cannot confer such extraterritorial right upon him . . ."

75 C.J.S. 399 "a. In general, property situated in jurisdictions other than that of the receiver's appointment will be administered by the state in which it is found; and in the event of conflict between the rights of resident creditors and foreign receivers, ordinarily the former are preferred.

". . . In other words, the appointment of a receiver of an insolvent debtor in the foreign state where he resides does not affect the rights of domestic creditors . . . suing in domestic courts to proceed to collect their debts in the domestic state . . . at most, the right of a receiver will not be recognized against attaching creditors, or as against citizens with title to local assets or whose claims are entitled to priority as equitable liens . . ."

75 C.J.S. 399"b. Generally, a resident attaching creditor is favored over a foreign receiver,

even as to attachments contemporaneous with, or subsequent to, the appointment of the receiver. The domestic creditor may institute attachment proceedings subsequently to and not withstanding the foreign appointment . . ."

53 C.J. 667, p. 401: "Conflicting Rights of Receivers and Creditors. a. In General . . . Creditors in another state may pursue their legal remedies under the laws of such state against property there situated notwithstanding the foreign receivership and as against claim of right on the part of the foreign receiver.

" . . . Whilst on the principle of comity the power and rights of a foreign receiver will be recognized, this principle is never extended or enforced to the embarrassment or loss to local creditors."

"The appointment of a receiver of a foreign corporation by a court of the state of its domicil . . . does not defeat or destroy the lien of attaching creditors in the other state acquired after the appointment of such receiver." (Muller v. American Co-op Association, 110 Nebr. 773, 195 N.W. 167.)

In frustrating the lawful efforts of Robert and Claudia Hatch to collect their judgment in Texas, the Courts below violate strictures of federalism which confine the power of a receiver to the state of his

appointment, unless through application for comity or appointment of an ancillary receiver in a sister state he can extend his authority and rights, subject to the laws and jurisdiction of the other state.

4. The Courts Below Did Not Give Full Faith and Credit to the Laws and Judicial Proceedings of the State of Texas.

At no point in their decisions do the U.S. Court of Appeals or the U.S. District Court recognize, mention or take notice of the garnishment statutes, rules and cases of Texas. Nor do the other parties—the Receiver for Heritage and Reliance—anywhere in their various briefs and oral arguments admit even the existence of such Texas laws.

Petitioners, Robert and Claudia Hatch, adhered strictly to the Texas statutes, rules and cases in filing their writ of garnishment on Reliance. (Applicable provisions of the statutes and rules are reproduced above under "Constitutional and Statutory Provisions.") They were given no credit or recognition by the Courts below.

The Act of Congress applying Article IV, Section 1. of the United States Constitution (Full Faith and

Credit—Supra) to the federal courts is 28 U.S.C. 1738, Section 3. (Supra.) "This section makes concept of full faith and credit clause of the federal Constitution applicable in federal court where prior suit has been in state court and subsequent suit is in federal court." (Williams v. Murdock, C.A. Pa., 1964, 330 F. 2_d 745.)

Nor were the judgment and judicial proceedings of the Hatches in the Texas court of original jurisdiction given the same credit by the Federal interpleader court or the U.S. Court of Appeals that they would have been given by the Texas court had not the federal injunction prevented trial in that court. For, as related to the failure by the courts below to recognize the Texas court's right to enforce its judgment by garnishment after judgment, it is well established that "Process subsequent to judgment is as essential to jurisdiction as process antecedent, else the judicial power would be incomplete and entirely inadequate to the purpose for which it was conferred," and "the jurisdiction of a court is not exhausted by the rendition of judgment but continues until the judgment shall be satisfied." "To deprive a court of the power to execute its decrees is to essentially impair its jurisdiction." (Central National Bank, Stevens, N.Y., 18 S. Ct. 403, 169 U.S. 432, 42 L. Ed. 807) (1898).

The leading case mandating federal interpleader courts to give full faith and credit to state proceedings is Sanders v. Armour Fertilizer Works (supra). In Sanders, the litigation maneuvers by the insurance companies are revealed as identical to those of Reliance in the Hatch case. Armour claimed a debt owing from Sanders who had a claim against the insurance companies. Armour filed garnishment on the insurance companies in Illinois. The garnishee insurance companies removed the litigation by interpleader to the federal District Court in Texas, in which state the insurance monies were exempt from garnishment. The U.S. District Court went along with Sanders, the insured, and the garnishee insurance companies, and held that garnishment could not attach in Texas. The U.S. Court of appeals for the 5th Circuit reversed. The Supreme Court affirmed the holding of the Appeals Court, saying,

"The District Court, of course, is bound on interpleader to give full faith and credit to the garnishment proceedings in Illinois." And,

"The applicant for interpleader often has the choice of forum and he cannot at his will subject the rights of the contesting claimants to one set of laws rather than another. The purpose of the interpleader

statute was to give the stakeholder protection, but in no wise to change the rights of the claimants by its operation. Interpleader is a suit in equity, and equitable principles and procedure are the same throughout the Federal jurisdiction. The court is to weigh the right or title of each claimant under the law of the state where it arose . . ."

(The garnisher) "seeks nothing under any Texas law. Brought into the District Court against its will, it is held there against its protest and enjoined from proceeding further in Illinois. It now claims priority of right and asks only what it would have secured but for this injunction. Under such circumstances to hold that statutes of Texas control would destroy rights duly attained in Illinois; would permit the insurance companies by interpleader proceedings to change the positions of the defendants; and, in effect, seriously interfere with the impartial adjustment of existing equities . . .

"In the circumstances presented, the proceedings in Illinois gave to" (Armour, the garnisher—in the position of the Hatches) "a paramount right or superior equity to the proceeds of the policies. To hold that the District Court in Texas could enjoin the Fertilizer

Works from proceeding further and then declare that because the last step in the Illinois suit had not been taken, Sanders (in the position of Heritage) in some way became entitled to priority, plainly would be inequitable. Moreover, it would deny to the garnishment proceedings the credit and effect accorded them in the State where taken . . .

(The garnishee's) "obligation to pay his creditor is thereby arrested and a lien created upon the debt itself . . ."

CONCLUSION

To sum up, full faith and credit must be given by the federal interpleader court to the judicial proceedings and the law of Texas. The garnishment law of Texas provides that a writ of garnishment served on a debtor of the principal defendant creates a lien and impounds the debt owed to the principal defendant. The appointment of a Receiver by an Arizona court does not invalidate a prior judgment in Texas and does not make the garnishee's debt exempt from garnishment in Texas.

By affirming the U.S. District Court's conclusions of law which are in error on the questions of law presented for review, the U.S. Court of Appeals for the Ninth Circuit has decided all such state and federal questions in a way that conflicts with applicable decisions of the United States Supreme Court.

Petitioners pray that the Court will consider and resolve this matter and respectfully suggest that summary disposition for Petitioners on the merits may be appropriate.

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Attorney for Petitioners

March 12, 1982.

Appendix

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed Nov. 5, 1981

RELIANCE INSURANCE COMPANY, a corporation, Plaintiff-Appellee, v. RICHARD W. KOEB et al, Defendants-Appellees and ROBERT C. HATCH and CLAUDIA R. HATCH, his wife, Defendants-Appellants.	No. 80-5277 D.C. #Cv 77-843 VAC MEMORANDUM

Appeal from the United States District Court
for the District of Arizona
Valdemar A. Cordova, District Judge, Presiding
Argued and Submitted October 15, 1981

Before: SCHROEDER, NELSON, and CANBY, Circuit Judges.

The Hatches appeal from the denial by the district court of their motion for a judgment that, by virtue of a Texas judgment against Heritage and subsequent garnishment proceedings against Reliance, they are entitled to the proceeds of a bond purportedly issued by Reliance in favor of Heritage. Heritage opposed the motion. Because all of the assets,

including any rights which Heritage may have to the proceeds of the bond, were placed in the hands of a receiver in Arizona before the Hatches served the writ of garnishment on Reliance, the garnishment could not have resulted in a valid attachment of any debt owed by Reliance to Heritage. 75 C.J.S. Receivers Sec. 135 at 775.

The failure of the district court to certify this matter pursuant to Fed. R. Civ. P. 54(b) has been remedied and this Court is satisfied that the judgment appealed from disposes of the Hatches' claim against Reliance in this interpleader action.

Affirmed.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RELIANCE INSURANCE COMPANY, a corporation, Plaintiff-Appellee, v. RICHARD W. KOEB, ET AL., and ROBERT C. HATCH and CLAUDIA R. HATCH, his wife, Defendants-Appellants.	Filed Dec. 23, 1981 No. 80-5277 ORDER

Before: SCHROEDER, CANBY, and NELSON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

Filed
Feb. 6, 1980

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

RELIANCE INSURANCE COMPANY, a corporation Plaintiff, v. ROBERT C. HATCH and CLAUDIA R. HATCH, his wife, et al., Defendants.	NO. CIV 77-843 PHX VAC OPINION AND ORDER

This matter was submitted to the Court for determination on the pleadings and memoranda of the parties respecting the Motion for Declaratory Judgment of the defendant Robert C. Hatch and Claudia R. Hatch, his wife. The action is one in the nature of an interpleader filed by plaintiff Reliance Insurance Company, a corporation (hereinafter referred to as "Reliance") as insurer under a commercial blanket bond in the face amount of one million dollars. The bond was written for Federal Trust Company which later became Heritage Trust Company (hereinafter referred to as "Heritage"). The latter was owned and controlled by John R. Bromley and his wife, Bertha. On July 29, 1979 the Securities Exchange Commission filed suit against Heritage, its President and others. For the purpose of this motion it appears that Heritage suffered substantial losses because of the acts of the Bromleys.

Defendant Hatch obtained a default judgment against Heritage in Texas for actual and punitive damages and attorney's fees. On April 16, 1976, a receiver was appointed for Heritage by the Superior Court of Maricopa County, Arizona. An order issued from the Arizona court enjoining all trustors from proceeding further against Heritage in the State of Arizona.

On July 26, 1976, Walter C. Madsen, Receiver for Heritage, commenced an action in the Arizona court against Reliance on its bond. On March 30, 1977, defendants Hatch commenced a garnishment action against Reliance in the State of Texas on the same bond, and caused to be served then and there a writ of garnishment seeking payment of $129,972.22. Reliance filed their answer in said action denying any indebtedness to Heritage and the case was then set for trial in Galveston County, Texas.

On November 15, 1977 Reliance brought the present interpleader action in this Court joining the receiver Walter C. Madsen, Superintendent of Banks, State of Arizona, and Mr. and Mrs. Robert C. Hatch as defendants The present motion filed by defendants Hatch request a declaration by this Court that they have a lien on any funds owed to the defendant Heritage by Reliance.

Defendant Walter C. Madsen, Receiver for Heritage contends that the defendants Hatch have no prior claim to the debt allegedly owed by Reliance to Heritage in that the receiver was appointed prior to the attempt by defendants Hatch to garnish the debt.

Reliance responds that mere entry of judgment against the receivership in Texas did not result in a lien or priority claim to these receivership assets.

After due consideration, the Court finds that the denial of indebtedness of Reliance to Heritage in the Texas garnishment action creates a contingent question of liability. Further, the Court finds that the defendants Hatch do not have a priority claim to the debt, if in fact such a debt exists, in that no lien attached thereto prior to the appointment of the receiver in Arizona. The effect of the Texas judgment under Texas law was to create a lien on the realty within Texas and the judgment when filed in Arizona had a similar effect with regard to realty located in Arizona. It did not, however, create a lien upon personalty in Texas or Arizona.

A lien on personalty under the facts here presented could only have been obtained by attachment of the specific personalty and only if such attachment was made prior to the receiver's appointment. This defendants Hatch did not do and therefore,

IT IS ORDERED denying the motion of the defendant Robert C. Hatch and Claudia R. Hatch, his wife, for declaratory judgment.

DATED this 6th day of February, 1980.

Valdemar A. Cordova

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

RELIANCE INSURANCE COMPANY a corporation,	Date March 10, 1980
Plaintiff,	No. CIV 77-843 PHX VAC
vs.	
ROBERT C. HATCH and CLAUDIA R. HATCH, his wife, et al	
Defendant.	

Defendants Hatch having filed a Combined Motion to Alter or Amend Judgment and for New Trial, and the Court having duly considered the same and the responses and opposition thereto,

IT IS ORDERED granting the motion to alter or amend judgment in the first paragraph of the Opinion and Order to provide "that at the time the three-year-commercial blanket bond was issued to Heritage, that company was wholly owned and controlled by Mr. Royden Brown, whose shares were later acquired by John R. Bromley and Bertha Bromley:.

In the same paragraph, the date of filing of the Securities Exchange Commission suit against Heritage, its President and others is amended to read: "July 29, 1974."

In the second paragraph of the Opinion and Order, the date of the Texas judgment obtained by the defendants Hatch was "March 5, 1976" and the final Texas judgment was registered in Arizona "April 1, 1976."

IT IS FURTHER ORDERED denying defendants' Motion for New Trial.

Valdemar A. Cordova
United States District Judge

cc: All counsel of record

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

RELIANCE INSURANCE COMPANY, a corporation Plaintiff, vs. ROBERT C. HATCH and CLAUDIA R. HATCH, his wife, et al, Defendant.	Date 10/6/81 No. CIV 77-843 PHX VAC

In order to clarify the previous order of this Court dated February 6, 1980, as amended March 21, 1980,

IT IS HEREBY ORDERED, nunc pro tunc, supplementing that order by adding the following statement:

> It having been expressly determined by this Court that there is no just reason for delay, the Court expressly directs that this order be entered as a final judgment.

Valdemar A. Cordova
United States District Judge

Filed Nov. 5, 1981

APPENDIX F

Sec. 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in Section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if

(2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

APPENDIX G

CHAPTER 151—DECLARATORY JUDGMENTS

Sec.
2201. Creation of remedy.
2202. Further relief.

Sec. 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

APPENDIX H

RULE 57. Declaratory Judgments

The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. Sec. 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the cirumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. (As amended Dec. 29, 1948, eff. Oct. 20, 1949.)

APPENDIX I.

SEC. 1652. STATE LAWS AS RULES OF DECISION

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Opposition

Supreme Court, U.S.
FILED
APR 14 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT C. HATCH and CLAUDIA R. HATCH
Petitioners,

vs.

WALTER C. MADSEN, Superintendent of Banks for the State of Arizona, as Receiver for Heritage Trust Company, a corporation
and
RELIANCE INSURANCE COMPANY, a corporation
Respondents.

Respondent Reliance Insurance Company's Brief in Opposition to Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Is an alleged indebtedness due an insured on a fidelity bond issued in Arizona subject to a garnishment in Texas, when prior to the garnishment the insured has been placed in receivership in Arizona and the Arizona receiver has brought an action in Arizona against the surety to recover the proceeds of the bond?

2. Is a Texas creditor precluded from obtaining a garnishment lien in Texas upon a debt allegedly due its debtor after the debtor has been placed in receivership in Arizona and the duly appointed receiver has instituted an Arizona action to collect the alleged debt?

3. Did a Texas garnishment proceeding, instituted subsequent to the appointment of an Arizona receiver, and after the institution by that receiver of an action in Arizona to recover bond proceeds, create a lien in favor of the Texas garnishors, thus giving them a priority and preference over all other general creditors whose claim against the bond is being pursued by the receiver?

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No. 81-1704

IN THE

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ROBERT C. HATCH and CLAUDIA R. HATCH
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WALTER C. MADSEN, Superintendent of Banks for the State of Arizona, as Receiver for Heritage Trust Company, a corporation
and
RELIANCE INSURANCE COMPANY, a corporation
Respondents.

Respondent Reliance Insurance Company's Brief in Opposition to Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Respondent Reliance Insurance Company requests that the Petition for Writ of Certiorari in this matter be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners have set forth, in this section of their petition, various provisions from the United States Constitution and the United States Code dealing with full faith and credit

and state laws as rules of decision. Pursuant to Rule 32.2, Rules of the Supreme Court of the United States, Respondent advises the Court that it disagrees with said presentation by Petitioner, and respectfully submits that the issues herein presented have nothing to do with full faith and credit or state laws as rules of decision.

STATEMENT OF THE CASE

The litigation underlying the instant Petition is an action in the nature of interpleader whereby Respondent, Reliance Insurance Company ("Reliance"), sought a determination of the respective parties' right and entitlement, if any, to the proceeds of a commercial blanket bond issued by Reliance to Heritage Trust Company ("Heritage"). Petitioners filed a "Motion for Declaratory Judgment" in the interpleader action whereby they sought a summary determination by the United States District Court for the District of Arizona that they were entitled to a priority claim to any funds found owing from Reliance to Heritage by virtue of the bond. The District Court, the Honorable Valdemar A. Cordova, Judge, determined that Petitioners had no priority claim to the funds and denied Petitioners' motion by Order of February 6, 1980, as amended on March 20, 1980. (Petitioners' Appendix C) Petitioners then moved the District Court for a new trial, which motion was denied by Order dated March 10, 1980. (Petitioners' Appendix D) Petitioners appealed, and oral argument was presented to the United States Court of Appeals for the Ninth Circuit on October 15, 1981. On November 5, 1981, the Court of Appeals issued its Memorandum Opinion unanimously affirming the order below. (Petitioners' Appendix A) Petitioners then moved for rehearing en banc and on December 23, 1981, the Court of Appeals issued its Order stating,

inter alia, "[T]he full court has been advised of the suggestions for rehearing en banc, and no judge of the Court has requested a vote on the suggestion for rehearing en banc . . ." The petition for rehearing was denied and the suggestion for rehearing en banc was rejected. (Petitioners' Appendix B) Petitioners now seek an intervention and reversal by this Court, by Petition for Writ of Certiorari dated March 12, 1982.

The facts relevant to an understanding of the matters decided below are as follows: Respondent Reliance issued a commercial blanket fidelity bond in the penal amount of one million dollars to Heritage Trust Company (then known as Federal Trust Company) in Arizona on December 15, 1972. This bond remained in force and effect until August 15, 1974, at which time it was cancelled. By this bond, Reliance agreed to indemnify Heritage for losses to Heritage, which losses were occasioned by fraudulent or dishonest acts of covered employees. (The bond was not intended to, and does not provide coverage running to the investors or trustors of Heritage or other third parties.)

At all times material to this litigation, Heritage was owned and controlled by John R. Bromley and his wife, Bertha. Heritage was, at all relevant times, an Arizona corporation with its principal place of business in Arizona. Subsequent to the cancellation of the bond, more than 40 lawsuits were brought in various jurisdictions against Heritage and its principal officers, the Bromleys. These lawsuits uniformly sought recovery of funds against Heritage and the Bromleys on the basis of various allegations sounding in fraud. Reliance was not a party to any of these lawsuits and had no notice or knowledge of them. No claim was asserted against the aforementioned bond in any of these actions.

One such action was brought on December 16, 1975, by the Petitioners, Robert and Claudia Hatch, in the 56th Judicial District of Galveston County, Texas. It appears that the Hatches had entrusted an amount of approximately $11,000 to Heritage to invest and manage for them in high yield, capital growth investment ventures. When the Hatches sued in Galveston County, service upon Heritage and its officers was made by service of a summons and complaint on the Secretary of State of Texas, pursuant to a Texas statutory provision. Neither Heritage nor the Bromleys appeared to defend this action, and, in fact, have asserted that they never had any notice of the Texas action. On March 5, 1976, Petitioners Hatch obtained a default judgment against Heritage and its officers in the Texas court in the sum of $129,972.22. Reliance was not a party to the Texas action and had no knowledge of it. The Texas lawsuit made no claim against or mention of the Reliance bond.

On April 16, 1976, the Superior Court of Arizona, Maricopa County, pursuant to § 6-865, Arizona Revised Statutes, as amended (Appendix A), appointed the Arizona State Superintendent of Banks as Receiver for Heritage Trust Company and authorized said Receiver to obtain possession and control of the assets of Heritage. Attendant to that Receivership, the court entered its order staying all persons and their attorneys from commencing, prosecuting, continuing or enforcing any proceeding against Heritage or its assets, and further enjoined such persons from causing to be executed any "execution or other process for the purpose of impounding or taking possession of or interfering with, or creating or enforcing a lien upon any property owned by or in the possession of . . . the receiver." On July 26, 1976, the Receiver filed an action in the Superior Court of Arizona against Reliance, seeking to recover, (as Receiver of

Heritage), the full penal sum of the bond, based upon the alleged fraudulent and dishonest acts of the Bromleys. This was the first attempt by anyone to assert a claim against the bond, and the first action involving Heritage of which Reliance had notice or was a party.

Eight months after the Receiver filed his lawsuit against Reliance, in March, 1977, Petitioners Hatch initiated a garnishment action in Texas against Reliance by which they sought payment of $129,972.22 from the bond proceeds.

As a result of the two inconsistent claims against the prospective bond proceeds, on November 15, 1977, Reliance instituted the action in the nature of interpleader.

On August 8, 1979, the Hatches filed their "Motion for Declaratory Judgment," seeking a ruling that, by reason of their Texas garnishment, they had priority over the claims of all other unsecured creditors. The proceedings following the filing of Petitioners' motion are set forth in the first paragraph above.

SUMMARY OF ARGUMENT

Throughout this proceeding, Petitioners Hatch have sought a determination that they are, by virtue of a Texas garnishment issued and served approximately one year after the property sought to be garnished came into *custodia legis* of the receivership court, entitled to impress a lien and priority on any proceeds found due on the Reliance bond. At the time of the attempted garnishment, the bond was not subject to garnishment or other legal process by creditors of Heritage. Petitioners' garnishment, coming subsequent to the appointment of the Receiver and after the Receiver's action on the bond, came too late to give Petitioners any right or claim to the bond superior to that of the Receiver. The decision of the District Court and Court of Appeals

that any indebtedness owed by Reliance to the Receiver may not be reached by the subsequent writ of garnishment served on Reliance in Texas, rests upon alternative analyses, either of which fully supports the decisions below. The legal principles may be summarized as follows:

(a) One who has no lien when a receiver is appointed cannot, subsequent to the appointment, obtain a lien on the property which has passed into the receiver's hands, and thereby gain a preference over other creditors entitled to share equitably in the distribution of the estate.

(b) Garnishment proceedings serve only to subrogate the plaintiff therein to the rights of the debtor against the garnishee, and the plaintiff can enforce no rights against the garnishee that his debtor could not enforce.

ARGUMENT

I. The Debt From Reliance to the Receiver Was Not Subject to the Jurisdiction of the Texas Court on March 30, 1977.

The Receiver, having been duly appointed by the Arizona Superior Court on April 16, 1976, duly took possession of the assets of Heritage, subject to the Court's control, pursuant to Rule 66(c), Arizona Rules of Civil Procedure which is set forth herein as Appendix B. Once in the actual or constructive possession of the Receiver, the assets of the receivership debtor are not subject to dissipation or seizure by virtue of execution by certain creditors of the receivership debtor seeking to obtain a preference in the receivership court or elsewhere. The law in this regard has been fairly summarized by the author of the annotation beginning Annot., 91 A.L.R. 996 (1934):

> "It is a well-settled principal of law that when a court of competent jurisdiction acquires jurisdiction over the subject-matter of a case, its authority therein

continues until the matter is finally and completely disposed of, and no court of coordinate authority is at liberty to interfere with its action. 7 R.C.L. 1067.

"As a corollary to this rule is the rule that a court which first acquires lawful jurisdiction over a specific property, by seizure thereof or otherwise, withdraws that property from the jurisdiction of every other court, so far as it is necessary to accomplish the purpose of the suit, and is entitled to retain such control over such property as is requisite to effectuate its final judgment or decree in respect thereto, free from the interference of every other tribunal. 7 R.C.L. 1068.

• • •

"Where, however, the suit in another tribunal is one not against the receiver himself, but against the receivership defendant, and its object is not to subject the property in the hands of the receiver or in the custody of the receivership court, but merely to establish or liquidate a claim or demand personally against the receivership defendant, the position has been taken that leave to sue by the court appointing the receiver is not necessary. (Citation omitted)

In such case, of course, the judgment rendered merely determines the existence and the amount of the claim, and does not entitle the plaintiff to levy execution on or otherwise proceed against the property in the hands of the receiver. It must be filed for allowance in the receivership court, and, when so filed, due recognition must be accorded to it in the distribution of the estate. The plaintiff is not bound to re-establish the claim in the receivership court. See Reihle v. Margolies [1929] 279 U.S. 218, 73 L.ed. 669, 49 S.Ct. 310." (Emphasis added)

The law is equally well-settled that the mere entry of a judgment against a receivership defendant does not create a lien or priority claim to the receivership assets. At

Annot., 96 A.L.R. 485, (1935) for example, the author recites:

> "These principles of law give rise to the interesting question as to the effect of such action [instituted in another forum, either before or after the appointment of the receiver, but pending at the time of such appointment, or consummated by a judgment after such appointment] upon the right of the receiver and the receivership court to pass upon the merits or the amount of the claim.
>
> *"Unquestionably, a court other than the one appointing the receiver, by taking cognizance of the claim after the appointment of the receiver, cannot by the rendition of a judgment reach, by execution or otherwise, property of the estate in the hands of the receivership court through its receiver; nor can this result be accomplished in a suit commenced in such court before the appointment of the receiver, in which the jurisdiction of that court has not attached to the property, actually or constructively, before the jurisdiction of the receivership court has so attached by the appointment of a receiver. The only effect of such judgment, therefore, is to establish and liquidate the claim as a valid existing indebtedness of the receivership defendant, which, along with the claims of other creditors, may be proved and allowed in the distribution of the estate."* (Emphasis added)

The Encyclopedias agree. 66 Am.Jur. 2d, Receivers, §§ 263, 342, 343. The General Rules have also been recited in 75 C.J.S., Receivers, as follows:

> "As a general rule it may be stated that property in the possession of a receiver is in custodia legis, and the receiver's possession is the possession of the court for the benefit of those ultimately entitled. (§ 104 at 747)
>
> *"It is a general rule that one who has no lien when a receiver is appointed cannot, after the appointment,*

obtain a lien on the property in the receiver's hands, and thereby gain a preference over other creditors entitled to share equitably in the distribution of the estate, and this is true even though the right to acquire a lien existed before the appointment. (§ 132 at 770)

"Likewise, where someone else is garnishee, the receiver's title will prevail over the claim of a garnishing creditor, provided the receiver's title has attached at the time of the service of the garnishee process." (§ 135 at 775)

The applicability of the principles espoused herein presuppose that the asset sought to be garnished or attached is within the possession of the Receiver and thus controlled by the Arizona Court. *Gilbertson v. Northern Trust Co.*, 207 N.W. 42 (N.D., 1925), for example, involved an action by a receiver against a bank's fidelity insurer which claimed a right of offset. The court's decision is consistent with the general rule that the right of offset, if any, must be fixed at the moment of insolvency. In reaching that conclusion, however, the court stated, at 45:

> "Next, a receiver takes the estate of an insolvent for the benefit of the creditors; he is in effect an assignee, and stands in the shoes of the insolvent with exactly the same rights and obligations that the latter had at the moment of insolvency. Therefore choses of action pass to him subject to any right of set-off existing at the time of the appointment."

The analogy, obviously, is clear. The claim of Heritage against Reliance passed, at the moment of appointment, to the Receiver, and no lien could be asserted from any subsequent garnishment wherever it may have been served. The appointment of the Receiver placed the chose in action against Reliance in the constructive possession of the Receiver. The Receiver subsequently, in the same court, commenced the lawsuit against Reliance to obtain actual pos-

session. The Receiver should be permitted to pursue the claim to its logical conclusion for the benefit of all creditors.

The above authorities set forth the well established rule of law that one who has no lien when a receiver is appointed cannot, after the appointment, impress a lien on property in the receiver's actual or constructive possession and thereby gain a priority or preference over all other similarly situated creditors or trustors who are entitled to share equitably in the distribution of the estate. This is true irrespective of the fact that the right to acquire a lien may have existed prior to the appointment of the receiver. *Saper v. West,* 263 F.2d 422 (2nd Cir. 1959), *cert. denied,* 360 U.S. 916 (1959); *Clark v. Bacorn,* 116 F. 617 (9th Cir. 1902); *Lehman v. Heberle,* 9 F.Supp. 100 (W.D.N.Y. 1934); 91 A.L.R. 996 (1934); 75 C.J.S. Receivers § 132 (1952).

As should be apparent from the record, the entire matter now before the Court arises out of the attempt by Petitioners Hatch to gain a priority or preference (in an amount of more than ten times their actual investment) over all other trustors who are similarly situated and who would be entitled to share equitably in the receivership assets. It should not be surprising that the law uniformly and clearly rejects Petitioners' position.

Petitioners assert that the bond and its prospective proceeds were not in the possession of the Receiver when they instituted their garnishment. This argument simply ignores the law relative to receivership assets:

> "The effect of the appointment of a receiver is to put the property from that time on in the custody of the court for the benefit of the party ultimately found to be entitled to it. When the court has thus assumed jurisdiction, possession and control over the property, it is thenceforth as much in its possession as if already in the actual possession of the receiver.

• • •

> "Jurisdiction over the res may be acquired by acts other than actual seizure, for instance by acts which according to established procedure stand for dominion and in effect subject the property to judicial control. It may be by the mere commencement of an action, the object, or one of the objects, of which is to control, affect, or direct its disposition." 2 Clark on Receivers § 332, p. 597-98 (3rd ed. 1959).

Ordinarily, judgment debts, unless they are valid and subsisting liens or are based on priority claims, have no priority over simple debts. No lien can be acquired over property in the hands of the receiver. The court appointing the receiver has full jurisdiction and control over the debtor's property and property rights and holds them free from interference by any other court. 3 Clark on Receivers § 685, p. 1264 (3d ed. 1959); 65 Am.Jur. 2d Receivers § 166 (1972).

Funds or property in the hands of a duly appointed receiver are in custody of the law or in *custodia legis*. They are not subject to garnishment under Texas law or Arizona law. *Hardy v. Constuction Systems, Inc.*, 556 S.W.2d 843, 844 (Tex.Civ.App. 1977); *Houston Drywall, Inc. v. Construction Systems, Inc.*, 541 S.W.2d 220, 221 (Tex.Civ.App. 1976); *Goodson v. Carr*, 428 S.W.2d 875, 879 (Tex.Civ.App. 1968); *Southwestern Bell Tel. Co. v. Watson*, 413 S.W.2d 846, 848 (Tex.Civ.App. 1967); *O'Leary v. Sup. Ct. of Gila County*, 104 Ariz. 308, 452 P.2d 101 (1969); *Arizona Land Corp. v. Sterling*, 5 Ariz.App. 4, 422 P.2d 734 (1967).

> "It is the general rule that property in custody of the law is not subject to garnishment. This includes funds and property held in obedience to the law in hands of a receiver . . ." 26 Tex. Jur.2d Garnishment § 34, p. 705-06 (1961).

At the time petitioners initiated their garnishment action in Texas, Reliance's bond was already in custody of the Receiver and the Arizona Superior Court. Under Texas law, petitioners could not maintain a garnishment action against the bond. Their garnishment came too late to perfect any priority interest in the proceeds of the bond or to gain a priority over the Receiver's claim against the bond. This obvious fact was well recognized by both the District Court and the Court of Appeals, and was the basis of the Court of Appeals' holding that:

> "Because all of the assets, including any rights which Heritage may have to the proceeds of the bond, were placed in the hands of a receiver in Arizona before the Hatches served the writ of garnishment on Reliance, the garnishment could not have resulted in a valid attachment of any debt owed by Reliance to Heritage." (Petitioners' Appendix A)

II. Heritage Could Not Have Maintained an Action Against Reliance, in Texas, on March 30, 1977; Hence, the Hatches Did Not Perfect Any Rights Against Reliance by Reason of the Writ of Garnishment Then Served.

The Hatches urge, here and below, that the Texas garnishment should, under the principles of *Sanders v. Armour Fertilizer Works*, 54 S.Ct. 677, 292 U.S. 190 (1934), entitle them to a prior lien (equal to their judgment against Heritage), in any proceeds forthcoming on the bond. Analysis of the *Sanders* case shows it to be inapposite on both the facts and the law. In *Sanders*, the garnishor-plaintiff, Armour, an Illinois corporation, initiated the proceeding by filing an Illinois garnishment against the fire insurance companies of Sanders, a resident of Texas. This Illinois garnishment was the first legal proceeding of any type involving the garnished fund. The fire insurers admitted liability to Sanders (for a fire which had occurred 15 days

prior to the garnishment) but also gave notice of Sanders' claim that the proceeds of such policies were exempt from garnishment under Texas law. The Illinois court sustained the garnishment of the proceeds, awarded recovery in the amount sought by Armour, and directed execution on the fund. 292 U.S. at pp. 196, 197. Prior to the execution, the insurance companies interpleaded the funds into the District Court, Eastern District of Texas. Sanders and Armour were named as the adverse claimants to the fund. The issue then, was whether the Texas statute exempting said proceeds from garnishment could be invoked in the interpleader action to defeat the effect of the Illinois garnishment. In a 5-4 decision, the Court held that the garnishment had created a lien on the funds, subsequently interpleaded, and that said lien followed the fund into the interpleader court.

The glaring difference in the instant matter is that in the case at bar, the bond and its prospective proceeds were in the hands of the receivership court and the Receiver was proceeding with an action on the bond on behalf of all creditors long before Petitioners attempted to gain a preference over the other creditors by their Texas garnishment. The chose in action against the bond simply was not subject to execution in Texas or elsewhere. Thus the District Court concluded:

> "[T]he Court finds that the defendants Hatch do not have a priority claim to the debt, if in fact such a debt exists, in that no lien attached thereto prior to the appointment of the receiver in Arizona. . . .
>
> "A lien on personalty under the facts here presented could only have been obtained by attachment of that specific personalty and only if such attachment was made prior to the receiver's appointment. This defendants Hatch did not do . . ." (Petitioners' Appendix C)

and the Court of Appeals concurred:

> "Because all of the assets, including any rights which Heritage may have to the proceeds of the bond, were placed in the hands of a receiver in Arizona before the Hatches served the writ of garnishment on Reliance, the garnishment could not have resulted in a valid attachment of any debt owed by Reliance to Heritage." (Petitioners' Appendix A)

In *Sanders*, the majority, through Mr. Justice McReynolds, concluded that the Illinois proceedings gave Armour a paramount right or superior equity to the proceeds of the policies, based upon the following analysis:

> "It is unnecessary to enter upon discussion of vexed questions arising out of garnishment proceedings in different jurisdictions. The different views are well stated in Minor on Conflict of Laws, §§ 125, 126, 209. This Court has had occasion to consider the general subject in Cole v. Cunningham, 133 U.S. 107, 10 S.Ct. 269, 33 L.Ed. 538; (omitting citations). The latter says—
>
> 'Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the state where the attachment is laid. His obligation to pay to his creditor is therefore arrested and a lien created upon the debt itself. (omitting citations) *We can see no reason why the attachment could not be thus laid, provided the creditor of the garnishee could himself sue in that state, and its laws permitted the attachment*'." (Emphasis added)

It is the italicized proviso which further distinguishes *Sanders* from this case. The "creditor" of the garnishee, in the context of the *Sanders* decision was Heritage, against whom the Hatches had obtained judgment. Conceptually,

the Texas garnishment presupposed that Heritage was owed money by Reliance. Under the reasoning in *Sanders*, a prerequisite to a valid attachment of the proceeds is that the judgment debtor, Heritage, be able to pursue a Texas action against the garnishee, Reliance, at the time the garnishment issued. Significantly, however, Heritage could *not* have sued Reliance in Texas (or elsewhere) upon the fidelity claim—that cause of action having already vested in the Receiver who earlier commenced his lawsuit in Arizona.

Arguably, a Texas garnishment proceeding against Reliance initiated prior to April 16, 1976, might have served to elevate the judgment claim of the Hatches above the status of general creditors, but that circumstance is not presented. Upon the appointment of the Receiver, all rights in and to the Reliance fidelity bond passed from Heritage to the Receiver, as a matter of law. From and after the date, the Texas court did not have power to "attach" or "garnish" any indebtedness owed by Reliance to the Arizona Receiver who had acquired the same free of any lien or priority whatsoever.

CONCLUSION

The District Court properly analyzed and applied the law to this case. The Court of Appeals affirmed. There exists no error of fact or law. Petitioners have wholly failed to sustain their burden of establishing, under Rule 19, that there exist "special and important reasons" why the Writ should be granted. Contrary to the protestations of Petitioners, the decisions below were controlled by and applied well settled legal principles, and did not involve any important question of law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided

a federal question in a manner in conflict with applicable decisions of this Court or of another court of appeals on the same matter. The Court of Appeals correctly held that the findings and order of the District Court were proper and affirmed. It is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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Appendix

§ 6-865. Impairment of capital; unsafe condition; receivership

If it appears to the superintendent that the capital of a trust company is either reduced or impaired below one hundred and fifty thousand dollars or the affairs of the company are in an unsound condition, the superintendent shall order the company to make good any deficit or to remedy the unsafe condition of its affairs within sixty days of the date of such order and may restrict and regulate the operation of the trust business until the capital is so restored. If the deficiency in capital has not been made good and the unsafe condition remedied within the prescribed time the superintendent may apply to the superior court, in the county in which the principal office of the company is located, to be appointed receiver for the liquidation or rehabilitation of the company. The expense of such receivership shall be paid out of the assets of the trust company.

Added Laws 1971, Ch. 160, § 5, eff. Jan. 1, 1972.

Appendix B
RULES OF CIVIL PROCEDURE

66(c) Powers; termination; governing law

1. The receiver may, subject to control of the court, commence and defend actions. He shall take and keep possession of the property, receive rents, collect debts and perform such other duties respecting the property as authorized by the court.

2. The court may at any time suspend a receiver and may, upon notice, remove a receiver and appoint another.

3. A receivership may be terminated upon motion served with at least ten days notice upon all parties who have appeared in the proceedings. The court in the notice of hearing may require that a final account and report be filed and served, and may require the filing of written objections thereto. In the termination proceedings, the court shall take such evidence as is appropriate and shall make such order as is just concerning its termination, including all necessary orders on the fees and costs of the receivership.

4. In all matters relating to the appointment of receivers, to their powers, duties and liabilities, and to the power of the court, the principles of equity shall govern when applicable.

Amended, effective Nov. 1, 1967.